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NOTICE PLEADING *

THERE is little doubt that lawyers, the country over, form one of the most conservative elements of our population. The bankers, the large manufacturers, capitalists generally, are naturally fearful of changes the effect of which they cannot wholly foresee. It is almost equally natural that their legal advisers, thrown into intimate contact with them, and thus learning to see and appreciate their point of view, should share their conservatism. The men who give character to the American bar are these legal advisers. The rest of the bar largely follows their lead. Again, the daily training of a lawyer, the eternal hunt for precedent, the desire to be able to advise with certainty, the fulsome flattery of the common law in legal treatises old and new, — all these incline the lawyer to look to the past and trust it only, or at least, mainly. Therefore, in urging a proposed change upon the profession, one must expect even a strong case to receive scant recognition, and must be willing to state the facts as one sees them, and to be satisfied if time and a slowly altering professional opinion finally produce results. It is in this chastened spirit that I venture to propose again [1] the adoption of a system of pleading, based upon the principle of giving notice of the opposing claims of the parties, in contradistinction to the present principle requiring a complete

* The writer wishes to acknowledge his indebtedness to his colleagues, Dean Huston and Professor Cathcart, for valuable suggestions which have been of service.

[1] See "Judge Gilbert and Illinois Pleading Reform," 4 ILL. L. REV. 174.

allegation of all the ultimate facts which must be proved at the trial in order to establish their claims.[2]

I

Perhaps a short statement, attempting to visualize notice pleading, may be useful. The general idea seems to be easily comprehended, but it has been said that the concrete sort of pleading it would require is vague. Equally general and indefinite, however, is the conception of pleadings requiring an allegation of the essential facts; it is only our knowledge of numerous applications of the principle that gives it any concreteness. Apparently, therefore, the simplest way to remove this lack of definiteness in our notions of notice pleading is by a few illustrations.

Let us compare an ordinary special count on a contract, a common count for work and labor, a count for a negligent personal injury, and a count for libel with corresponding pleadings under a notice system. A special count on a contract contains four allegations which in the ordinary case are essential: the statement of the defendant's promise, the statement of the consideration for that promise, the averment of the performance of conditions, and the allegation of the breach. To be sufficient in substance and avoid a variance, the promise must be alleged with considerable accuracy. The consideration must be alleged fully and truthfully, and must be on its face a legally sufficient consideration. The performance of conditions may by statute now usually be alleged in general terms, but an excuse for non-performance must be specifically alleged. The breach must carefully fit the promise alleged and be on its face actionable.

Under notice pleading, to take a concrete example for the sake of definiteness, the complaint would merely allege that the plaintiff claims damages because the defendant failed to complete the purchase of the plaintiff's dwelling, 501 Prospect Avenue, St. Louis, as he had agreed, about July 1, 1916, to do. Under such a pleading

[2] This is the general rule. The modern English system permits notice pleading in many cases as an optional alternative: see HEPBURN, THE DEVELOPMENT OF CODE PLEADING, 211–25. Michigan has adopted notice pleading: see Sunderland, "The Michigan Judicature Act of 1915," 14 MICH. L. REV. 551 (part four of the entire article). The Municipal Court of Chicago has adopted notice pleading: see 4 ILL. L. REV. 512.

no question can arise (*a*) whether the promise is truthfully alleged; (*b*) whether express conditions to the promise which qualify it are stated; (*c*) whether the consideration alleged is legally sufficient; (*d*) whether it is the entire consideration; (*e*) whether it is the exact consideration; (*f*) whether the allegation of the performance of conditions is made; (*g*) whether an allegation of such performance will suffice when really performance did not take place but was excused; (*h*) whether the breach alleged is a breach of the promise alleged, not to mention many other questions of the same character. Yet it notifies the defendant of the cause of action he will have to meet, and enables him, it would seem, to state and prepare his defenses. His answer might be: The defendant says (1) that no promise to purchase the said property was made by the defendant; (2) that the plaintiff was unable to convey a merchantable title to said property; (3) that the claims of the parties concerning the alleged contract of purchase were referred to arbitrators whose award was that the defendant was not in any way liable. Under notice pleading no objection can be made on the ground that an allegation is a conclusion of law, unless it is also too indefinite to give the plaintiff adequate notice of the defense relied on. Though this may sound like a new proposition, it is in truth not such. Our present pleadings are full of allegations of law, averments which are compounds of law and fact, and not purely statements of fact. That is the reason why instructions must be given by the judge to the jury. If the pleadings really alleged "fact," the jury could decide on their truth without any instructions concerning law. Did a wagon X. was driving collide with Y.'s person? What instruction would be necessary to enable the jury to decide that? But if we ask, did the defendant "promise" to buy the plaintiff's dwelling, then the jury must have aid from the court. The word "promise," when used in a pleading, means an undertaking bearing such a relation to the consideration alleged and made under such circumstances that, in the absence of some special objection, it will be enforceable. Obviously here are questions beyond the jury's province. So the commonest allegations in our present pleading are compounds of law and fact. If the allegation gets too indefinite, we call it an allegation of law and exclude it. Under notice pleading, if the allegation is so general as to give inadequate notice, it would be excluded or particulars required.

Consider next the ordinary common count for work and labor. This count is so extremely indefinite that under notice pleading it would not suffice. Its substitute might run: The plaintiff claims one hundred and fifty dollars for wages due for service as the defendant's chauffeur, during January, February, and March, 1916. This tells the defendant what he is sued for, which the common count does not do, and yet avoids the needless technicality of the usual special count.

An ordinary count for a negligent injury is a nice piece of mechanism. Allegations showing the defendant's duty to use care, the defendant's act stated with reasonable detail, his negligence, the legal causation of some specific injury to the plaintiff, perhaps the plaintiff's use of due care, his non-assumption of the risk, and other statements for slightly varying cases must be included, or one is subject to a general demurrer. Notice pleading, of course, would omit most of these averments, which give the defendant slight assistance in defending, and instead would tell him plainly and simply what the plaintiff demands. For example, the plaintiff claims damages for personal injuries sustained by being struck by the defendant's motorcycle, about August 1, 1916; such would seem to be an adequate notice pleading. The defendant will know, without any allegation, that the plaintiff claims that the defendant was negligent when he was legally obliged to be careful, that the plaintiff was free from fault, that the defendant's act caused injury to the plaintiff, and the other essential matters. The inclusion of these allegations of law in the complaint will not assist the defendant materially.

Turn now to that over-abundant growth, the complaint for libel. Compare its inducements, *colloquia*, innuendoes, "of the plaintiff," and so forth *ad nauseam*, with this simple statement: The plaintiff claims damages for a libel contained in the *Daily Argonaut* for October 16, 1916. If there could be reasonable doubt as to what statement is referred to, the complaint might state its general tenor sufficiently to identify it. It may be added that the pleader is not to be held to the exact date alleged; but the date must be accurate enough to direct the defendant to the defamation complained of. Thus, without requiring exact accuracy with the resulting danger of variance, the date becomes more important than under our present system. What a fine disregard of con-

sistency is shown by our common rule that, though the exact date be immaterial, it must be alleged for certainty, and yet need not be proved as laid![3] To such a complaint for libel the defendant might answer as follows: The defendant says (1) that the statement made is true; (2) that it was fair comment upon an article published by the plaintiff in *Onward* for October 7, 1916; (3) that the plaintiff released the defendant from liability for the statement.

Notice pleading then requires that the cause of action or defense relied upon shall be stated as simply as possible, consistent with giving adequate information to the opponent. It is to be hoped that no law would develop determining what is sufficient notice of any cause of action or defense. It should be left a question of fact in each case to be determined by the trial judge, or other officer in charge of the pleadings. The question would arise upon an application by the opponent for particulars. If the opponent truly needs the particulars to enable him to apprehend the pleader's position, they should be given, otherwise refused. And if the opponent does understand the pleader's claim, whether that be the result of the pleading itself or partly due to the opponent's own knowledge, he is obviously not entitled to particulars. That the judge may sometimes, for his own use, need and require a more complete pleading than that which may have been filed, is noticed below.

II

Does the present system work well? I think that all can see and appreciate the needless technicality and general inaptness of some of the rules of common-law pleading. The artificial forms of action, the broad general issues which do not give adequate notice, the common counts which are open to the same objection, and other defects well pointed out by Dean Ballantine in the

[3] Glenn *v.* Garrison, 17 N. J. L. 1, 3 (1839); Sage *v.* Hawley, 16 Conn. 106 (1844). This absurd result is an incidental effect of essential-fact pleading. It seemed necessary that time and place be alleged to fairly apprise the opponent of the cause of action or defense relied upon, so the allegation is required. But in substantially all actions the time of the happening of any fact is *prima facie* quite immaterial; only such a defense as the statute of limitations would make it material, so it need not be proved at all, or at least not as laid in the pleading. Likewise, place is really material in local actions only, with the result that in other actions it need not be proved as laid. Some modern courts have refused to follow this eccentric rule. Backus *v.* Clark, 1 Kan. 303 (1863).

"Illinois Law Bulletin," [4] need not be criticized again in this article. Code pleading was proposed and adopted to remedy those glaring faults. More than a dozen years before its adoption in New York the English judges, by their so-called "Hilary Rules," [5] had attempted to correct some of these evils. But my indictment against the present system of pleading goes deeper. Code pleading and Hilary Rules pleading require the facts essential to constitute a cause of action, the facts which must be proved at the trial, to be alleged in the pleadings. It is this fundamental principle of our present system that seems to me erroneous. But what are the objections to it? It is a fruitful source of the delay in litigation which is so commonly condemned; it causes a great waste of time on the part of appellate courts; it no doubt wastes much time in the trial courts, though proof of this is harder to obtain; and occasionally it leads to an improper conclusion of a particular litigation. Of these objections more will be said in another paragraph.

With a view to determining how our present system of pleading is actually working, I have examined, case by case, a few volumes of reports from widely separated jurisdictions in this country and from England. In every instance I noted or attempted to note all cases which were reversed on the pleadings. Usually I noted also the cases in which pleading points were discussed, though the lower court was affirmed. In general the volumes chosen were the latest volumes published from the jurisdiction in question at the time the examination was made, some six years ago.[6] But in the case of England volumes were chosen from the classical period of common-law pleading, say 1830, again from the developed Hilary Rules pleading, about 1846, as well as from recent reports under the pleading established by the Judicature Acts.[7] The Illinois reports were given disproportionate attention, because

[4] "The Need of Pleading Reform in Illinois," 1 ILLINOIS LAW BULLETIN, 3.

[5] These rules were adopted by the judges under parliamentary authority; they are found conveniently in 1 CHITTY, PLEADING, 16 Am. ed. 749.

[6] An earlier presentation of the results has been impossible.

[7] The Judicature Acts pleading is discussed clearly and yet concisely in HEPBURN, THE DEVELOPMENT OF CODE PLEADING, chap. 6. The inside history of the reform of pleading in England, culminating in the Judicature Acts pleading, is ably and interestingly told by Samuel Rosenbaum in "Studies in English Civil Procedure," published originally in 63 U. OF PA. L. REV. 151, 273, 380, 505.

the writer lived in that state at the time of the examination, and because Illinois has been singularly backward in instituting pleading reform. Exact accuracy could not be claimed for the tabulated results of this examination without undue rashness, but an honest effort has been made to have the results correct. Fractions have been avoided in computing results. With these remarks, intended to answer certain natural questions about the tabulation, it is printed in full.

We may notice first the remarkable figures from England. Under the common-law system the matter was bad enough with a pleading question decided in every sixth case. But under the Hilary Rules it was worse. Every fourth case decided a question on the pleadings. Pleading ran riot. No wonder that the English bench and bar were ready for reform. And what a successful reform the Judicature Acts were! In only one case in seventy-six can a pleading point be found. Reversals on questions of pleading drop from one in forty-four under the common law, and one in thirty-three under the Hilary Rules, to one in six hundred and five: one reversal in all the cases under the Judicature Acts which were examined. If anyone urges the adoption in any American jurisdiction of a pleading system analogous to that of the Judicature Acts, I for one am ready to second his efforts. The English system has been successful.

If we turn now to the figures from American jurisdictions, we ought to be confounded by them. In almost every instance the showing is worse than under any one of the three English systems. In a number of reversals on the pleadings we unhappily outdistance England entirely, the average for all the jurisdictions examined being one reversal in every twenty cases. If we leave out Michigan, which has long had partial notice pleading and has recently adopted it fully, the average is one reversal on pleadings for every seventeen cases. In affirmances on pleading points, the average is one in seven cases, or the same as under the English common law. If again we exclude Michigan, the average is one in every six cases. In this respect we are a trifle better than were the courts under the Hilary Rules. But our average of reversals is so much higher than theirs that on the whole they have the best of the argument.

Nor does it seem to make the least difference whether a state is a common-law or a code state. In the matter of reversals the

THE PROPORTION OF DECISIONS ON PLEADINGS IN APPELLATE COURTS

Jurisdiction	Volumes examined	Date	Total cases examined	Reversals	Affirmances	Total pleading discussions
English common-law pleading — H. L.	1 Dow & Clark	1827–30	32	0	1 in 11	1 in 11
English common-law pleading — Ex. Ch.	1 & 2 Cr. & J. (Ex. Ch. cases, only)	1830–32	13	1 in 6	1 in 4	1 in 3
English common-law pleading — Ex. Ch. & Exch.	1 C. & M.	1833	171	1 in 34	1 in 6	1 in 5
English common-law pleading — K. B.	1 Nev. & M.	1832–33	139	1 in 139	1 in 8	1 in 7
English common-law pleading — Total			355	1 in 44	1 in 7	1 in 6
English Hilary Rules pleading — Ex. Ch. & Exch.	16 M. & W.	1846–47	134	1 in 33	1 in 3	1 in 3
English Judicature Acts pleading — H. L.	A. C. 1906–09	1906–09	280	0	0	0
English Judicature Acts pleading — Divisional courts & Court of Appeal	(1907) 2 Ch. (part); (1908) 1 & 2 Ch.; (1909) 1 & 2 Ch.; (1907) 2 K. B. (part); (1908) 1 & 2 K. B.; (1909) 1 & 2 K. B.	1907–09	325	1 in 162	1 in 46	1 in 36
United States Sup. Ct.	221–24	1910–11	234	1 in 13	1 in 5	1 in 4
California	152–55	1907–09	435	1 in 15		
Connecticut	81; 90	1908–09; 1915–16	208	1 in 21	1 in 5	1 in 4
Illinois — Sup. Ct.	240–43	1909–10	283	1 in 15	1 in 5	1 in 4
Illinois — Sup. Ct.	249–52	1910–11	275	1 in 14	1 in 6	1 in 4
Illinois — App. Ct.	145–48	1908–09	484	1 in 19	1 in 8	1 in 5
Illinois — Appeals from the Municipal Court of Chicago	145–48; 161	1908–09; 1911	135	1 in 135	1 in 23	1 in 19
Iowa	139–42	1908–09	425	1 in 15		
Kansas	77–80	1908–09	585	1 in 13		
Massachusetts	204; 206–09	1910; 1910–11	550	1 in 92	1 in 11	1 in 10
Michigan	160	1910	110	1 in 37	1 in 14	1 in 10
Michigan	189	1916	101	0	1 in 20	1 in 20
Missouri	233–36	1910–11	132	1 in 44	1 in 4	1 in 4
New York	197; 199–202	1909–10; 1910–11	267	1 in 13	1 in 13	1 in 7
Ohio	77–80	1907–09	122	1 in 9		
Pennsylvania	256	1917	124	1 in 21	1 in 8	1 in 6
Tennessee	121	1908	26	1 in 26	1 in 5	1 in 4
Virginia	111–12	1910–11	232	1 in 20	1 in 7	1 in 5
Wisconsin	100–01	1898–99	185	1 in 15	1 in 6	1 in 4
Wisconsin	145–46	1911	173	1 in 43	1 in 7	1 in 6

common-law states average one in twenty-one, while the code states average one in twenty. In affirmances the common-law states average one in six, the code states one in seven. Code pleading has not reduced the number of cases which are decided on pleadings. It has not increased their number as did the Hilary Rules, but it has not effected any material reform as did the Judicature Acts. By this test it has largely failed in reducing delay in legal proceeding, or waste of time by the courts. One, therefore, who proposes that a common-law state adopt code pleading has really nothing in the above figures to commend his enterprise. Code pleading, in my judgment, is not the solution.

Before going further, one must congratulate the courts of Massachusetts. With only one reversal on pleadings in ninety-two cases and only one affirmance on pleadings in eleven cases, it occupies, compared with other American jurisdictions, a proud position. I have been told by one who should know that the Massachusetts Supreme Court is determined to avoid decisions on points of practice and pleading whenever possible, and to discourage the raising of such technical points on appeal. If true, the effect is excellent. Massachusetts uses a greatly modified common-law pleading.

The two late volumes of Wisconsin reports examined show a decided improvement over the earlier volumes. The Wisconsin court is pretty clearly taking much the same stand as the Massachusetts court. Wisconsin is of course a code state. Thus under any system much may be done to alleviate the situation by the determined efforts of the judges.

But the two courts that have the best records on the returns are the Michigan Supreme Court, and the Appellate Court of Illinois when sitting on appeals from the Municipal Court of Chicago. Is it not significant that these two courts are hearing appeals in cases which were tried under a system of notice pleading? In the last volume of Michigan reports available, containing cases decided since notice pleading was fully adopted, there is not a single reversal on a pleading question. Affirmances on pleadings had fallen to one in twenty. In the appeals from the Municipal Court of Chicago there was but one reversal on pleadings in one hundred and thirty-five cases, and but one affirmance on pleadings in every twenty-three cases. An inferior court of a great city with elected judges, sometimes able and sometimes not so able, has done business

without sending a great grist of pleading questions to be passed on by the appellate court! No doubt credit is due to the judges of the court and to its able and excellent Chief Justice, Harry Olsen; but is not the result due in part, possibly in large part, to the fact that the court, under powers granted to it by the legislature of Illinois, adopted a non-technical system of pleading, based on the general principle that any pleading is good that adequately notifies the opponent of the cause of action or defense he may expect to meet at the trial? That the same result has been achieved by the Michigan courts upon adopting a very similar system seems to argue that this reform is one to which American lawyers may well give serious consideration.

III

There is one fact concerning this examination of reports that many will, at first sight, consider a serious flaw in the whole investigation. In counting the reversals and affirmances on pleadings, opinions on the question whether a pleading contained sufficient facts to constitute a cause of action or defense, have been included. The commonest example arises when the defendant demurs to the declaration or complaint for insufficient facts, and, after decision below, the defeated party appeals. It is natural to assume, first, that these are useful cases settling points of substantive law; and, secondly, that they constitute a class of cases to be encouraged, because they are instances of the settlement of litigation on the pleadings without the expense of a trial.

But to the first assumption it may be answered that very often they really decide not a question of substantive law at all, that is, whether a fact is essential to the party's case or not, but merely some technical pleading question. Illustrations of this may easily be recalled: (1) When the court is called on to determine whether a complaint for negligence is sufficient without an allegation of due care on the plaintiff's part, the real question in dispute is not whether contributory negligence will bar the plaintiff, but whether the plaintiff must allege due care, or the defendant allege contributory negligence. And so in many cases the question decided is not whether the fact is material under the substantive law, but only whether, according to the law of pleading, it rests with the plaintiff or with the defendant to plead the fact. (2) Very often

the question, instead of being one of substantive law, is merely a question whether a certain fact, which the pleader intended to allege, was properly alleged. For example, it may be whether evidence rather than ultimate facts, or whether allegations of law rather than ultimate facts, have been alleged. Or it may be whether a fact has been alleged so hypothetically as to be bad in substance. (3) Many highly technical pleading points are thus raised upon demurrer, such as, whether a contract alleged, which is within the Statute of Frauds and which everyone knows is in writing, has to be alleged in the declaration to be in writing. Again, (4) there are often questions that arise through an attorney's failure to state some minor element of his case which could easily be established at the trial. In such a case the authorities may be dubious concerning the need for its allegation. The defendant, after the lower court has overruled his demurrer, may deem it wise to stand on his demurrer. Thus a highly unimportant question occupies the time of the appellate court. The plaintiff may concede that he has to prove the fact, but insist that his declaration need not allege it specifically. For example, in an action against a master for an injury caused by improper working conditions, must the plaintiff allege non-assumption of the risk? I fear that, if the truth could be discovered and told, we would find that far too many cases which are lost on demurrer are lost through oversight or lack of accurate pleading information on the part of the defeated counsel. Some such minor allegation is omitted through ignorance, and yet often without serious fault on the part of the attorney. The exact point on which the final court of appeal holds the complaint bad is not mentioned in the argument below, or the complaint would or should have been amended. It could have been alleged with a reasonable hope of proving it. But the case is finally lost on appeal, without the opportunity at that stage of amending, on a technical and unimportant question raised by inadvertence of counsel. (5) Another illustration of demurrers for insufficient facts which really raise no substantive law question is furnished by the declaration for defamation. It is ill suited to its purpose; it states some quite unnecessary things; its statement of essentials is highly artificial, not to say absurd. Yet its jargon of inducement, *colloquium*, and innuendo must be followed, or a general demurrer will prove efficacious. Would anyone claim that de-

cisions about these intellectual playthings settle points of substantive law or that they should be indulged in by adult courts!

We may conclude, then, that in many, perhaps most cases, decisions on demurrer, determining the sufficiency of the facts stated, settle no real questions concerning the substantial rights of the parties, but are in reality determinations in the law of procedure. It may truthfully be added that they are usually very unimportant determinations. And if this be so, the second assumption, that much is gained by having these questions settled without the expense of a trial, also fails; for one who wastes one hundred dollars a month should hardly be praised because he did not throw away a thousand. The point is that most of these matters need not be decided at all and would never arise under notice pleading. Judicial labor should not be spent upon them. To have serious litigation, involving substantial monetary interests, determined upon such frivolous questions is nothing short of absurd.

Of course there is a residuum of cases, no doubt a larger class in some courts than in others, where a demurrer is really used to determine whether the law will give redress on all the actual facts of the case. A proper system of pleading should retain this latter function of a demurrer, while eliminating all the futile uses just mentioned. However, it was found impracticable, in making the preceding tabulation, to separate these classes of cases without unreasonable labor. On that account both have been included as pleading questions. It is conceded that a portion of them are useful decisions and would have to be provided for in any sensible system. A means of accomplishing this is suggested later.

IV

Considering it now as reasonably established that our present systems of pleading bring far too many questions in that branch of procedural law before our appellate courts, with a consequent waste of their valuable time, a clogging of calendars, and an occasional miscarriage of justice, is there rational hope of improving the situation? I believe there is. What the English courts have done we should be able to accomplish. And that leads to the question, Why not adopt modern English pleading?

That system cannot be detailed in this article. Roughly speaking it may be said (*a*) to eliminate the technicalities that had developed in the common-law system; (*b*) to provide a considerable set of forms applicable to the commonest sorts of litigation, which must be used when pertinent and are to serve as analogies when not directly usable; (*c*) to permit in all, and to require in some cases pleadings which must state the essential facts of the cause of action or defense; but (*d*) to permit, in large classes of litigation, the omission of all formal pleadings stating the essential facts, and to substitute mere notices of the cause of action or defense, and, indeed, in many cases, to permit a rough statement of the nature of the cause of action, indorsed upon the summons, without any pleadings by the defendant at all.[8] In other words, the English system is a compromise which retains essential-fact pleading in part, adopts notice pleading in part, and for the rest makes all pleading unnecessary. Even so radical a position as the total abolition of pleading was urged by many members of the English bench and bar during the discussions which preceded the adoption of the modern English system.[9]

This English plan has proved so useful that the burden is plainly upon one who urges the acceptance of any other. Certainly it is more than probable that its general adoption in this country would be a long step in advance and be followed by real and large benefits. Still much may be said for attempting notice pleading pure and simple. (*a*) It has worked successfully in the Municipal Court of Chicago and in the state courts of Michigan. Indeed, Michigan has long been using it so far as the pleading of defenses is concerned. (*b*) It is much simpler than the English system, which is really quite complicated with its "Special Indorsement," "Indorsement for an Account," and "Indorsement for Trial without Plead-

[8] Another and a very important and useful provision places the pleadings and all the pre-trial proceedings under the supervision of a master for settlement and directions to counsel. This plan for saving judicial time and providing an informal method of settling procedural matters cannot be too highly recommended.

[9] Mr. Rosenbaum's article (see note 7, above) contains interesting references, on pages 292, 296, 300, 382, and 398 of the U. OF PA. L. REV., to the English discussions concerning pleadings. One wishes that he had set forth the difficulties encountered in framing a system of notice pleading (see page 300) with more particularity, or had referred to the sources of his information, if in print, so that the particulars would be readily obtainable. The difficulties suggested are discussed later in this article.

ings." The use of forms with modifications when necessary is after all merely a rule-of-thumb system. Perhaps it would not prove so satisfactory were it not for the English provision for the reference of pleading questions, along with other matters of practice, to a master who keeps the machinery oiled. Of course we can adopt it *in toto*. But notice pleading would entail less of change and so be more easily put into operation by our bench and bar. (*c*) The greater simplicity of notice pleading should reduce to a minimum the growth of those technicalities which seem inherent in procedural law. (*d*) Again the success of the English system may be due in considerable measure to the high standards required for admission to the English bar, and to the fact that the English bench attracts, by its difficulty of attainment, by the respect attached to it, and by the adequate remuneration received by the judges, the very best of the English bar. So long as a prominent state admits practitioners to its bar on the basis merely of good moral character, we may well bestir ourselves to adopt a simple system.

V

So far as the writer is informed, no one has formulated and published any comprehensive statement of the objections, valid or invalid, to notice pleading. But arguments have been advanced against it in the English journals when the Judicature Acts were in process of making or amendment, in sporadic references elsewhere, and in private conversations. These arguments may be summarized as follows: (1) The pleadings are likely to be ragged, scrappy, or disconnected. (2) They might be more expensive. (3) The advantage of having alleged facts admitted by non-denial would be lost. (4) Settlement of cases on demurrer without the expense of a trial would be impossible. (5) A party might often be taken by surprise at the trial, through evidence being presented that he did not anticipate. (6) The advantage that the present pleadings have in aiding the jury through a defining of the issues would be lost. (7) Likewise, the aid that the court receives from definite issues, both in passing on the relevancy of evidence and in framing instructions, would disappear. (8) It would be more difficult to apply the doctrine of *res judicata* accurately. (9) Careless, inaccurate pleading might lead to careless analysis of the

case on the part of both counsel and court, and result in inaccurate and unwise substantive law. These criticisms of notice pleading may now be considered in order.

1. The objection to ragged pleadings hardly needs a reply. The courts are not created or maintained to turn out literature, but to settle justly real controversies. The most effective means to that end is the one to be adopted.

2. There seems to be no real possibility that notice pleading would be more expensive. The pleadings would be shorter; pleading points would be seldom raised in appellate courts; when raised in the trial court they should and would be raised in a direct, expeditious, and economical way. To the argument that the lack of more formal pleadings will cause loss by creating trouble and delay in other stages of the procedure, a reply will be found in the answers to other objections, notably the fifth, sixth, and seventh.

3. The first answer to the objection, that admissions by non-denials would cease, is that such admissions are comparatively rare. The old idea that the pleadings are to reduce the case to a single issue must be considered obsolete. It is seldom that a prudent lawyer feels able to determine, in advance of the trial, the very point on which he may obtain a verdict. The result is that he puts in issue every fact which he thinks he has any chance of disproving, and pleads affirmatively every fact which he has any hope of proving. The admissions remaining are likely to be few. Secondly, admissions of the character just explained could almost invariably be obtained by stipulations between counsel. If that were impossible they could be obtained by the device of interrogatories and answers, introduced chiefly for another purpose (and therefore described in the answer to the next argument) but available also to meet the present need. Indeed, no doubt, more admissions could be secured in this way than are commonly made in pleadings at present.

4. It is urged under this head that under notice pleading the advantage of settling the case on demurrer is lost. In a previous part of this article I attempted to call attention to the fact that a large number of decisions on demurrer are not decisions on the merits, on the substantive law, but merely settle technical points of pleading. The loss of these gives the writer no concern; they involve a waste of judicial time and often a miscarriage of justice.

The residuum of determinations on demurrer should be preserved in some form. In a tentative Act Concerning Pleadings,[10] which I once had the temerity to formulate, I included the following device [11] to take care of these cases: If either party thinks the opponent has really no cause of action or defense, he may serve interrogatories on him which must be answered, possibly under oath, certainly subject to adequate penalty for a false answer. Having obtained the answers to these interrogatories, he may move the court to give judgment for himself on the ground that the answers of the opponent admit facts which show that such opponent has no cause of action or defense. The reader will perceive that this differs from a demurrer in vital respects. A demurrant wins if the demurree has omitted any essential allegation; the party who moves for judgment on his opponent's answers to interrogatories can win, only if the opponent has affirmatively admitted facts which are fatal to the latter's case. The dangers lurking in inadvertence and inaccurate allegation, which cause trouble under our present system, are wholly absent. Again, while a demurrer tests the sufficiency of the pleading to state a *prima facie* cause of action or defense, one may by interrogatories attempt to elicit any fact which is fatal to his opponent's case, whether necessary to the latter's *prima facie* case or not. Of course the interrogatories must be subject to the usual limitations; for example, immaterial or privileged answers could not be solicited. In the hands of a reasonably competent judge, such a proceeding ought to serve all the useful purposes of a demurrer and even catch some cases without foundation in fact, which under our present system go to trial. This device of interrogatories and answers could also be employed to obtain the admission of material facts, and thus to save the expense of proving them at the trial, even where there was no hope of obtaining sufficient admissions to settle the case entirely.

5. We consider next the suggestion that it is necessary, or at least reasonable, in order to protect the opponent and prevent surprise at the trial, to compel an allegation of all the essential facts of a cause of action or defense, and that therefore notice pleading is inadequate. The cardinal principle of notice pleading is that enough shall be stated adequately to apprise the opponent

[10] See "A Bill for an Act Concerning Pleadings," 5 ILL. L. REV. 364.
[11] See section 17 of the proposed act.

of the cause of action or defense. If that principle be carried into execution, how can the defendant be taken by surprise? Suppose he is notified that the plaintiff claims damages for injuries received by being run over by the defendant's automobile on the ninth of June, 1917, near the intersection of Madison and State streets in Chicago. Will the defendant's counsel be surprised at the trial if evidence is offered tending to prove (*a*) that the defendant or his servant was operating the car, or (*b*) that the driver could have reasonably foreseen injury to the plaintiff, or (*c*) that the act of the driver caused injury to the plaintiff, or (*d*) that the plaintiff was using due care? Surely any attorney fit to conduct a case in court might fairly be taken to expect these facts to be proved. Why then insist on their allegation? The allegation does no good. And its requirement brings down upon us an avalanche of decisions as to what are the essential facts — a matter already commented upon. Now, if the defendant had the misfortune to run over two persons on the ninth of June, 1917, he might need light as to the time of day that the plaintiff was injured. If he convinces the judge, or master in charge of settling the pleadings, that he does need light, then the plaintiff may be ordered to give the requisite information. Or perchance the defendant did not run over anybody at any time. He is in the dark as to why he is sued. Likely, however, he can defend on the principle of an alibi without further particulars. If particulars will really assist him they should be given to him. But will it assist him to tell him that he was negligent, that the plaintiff was not negligent, and that the defendant's act caused the injury? If, however, the opponent should get to the trial without a knowledge of what the other party was claiming, as might occur in very occasional instances, a simple remedy, not unknown to the law, would consist in postponing the trial until there was reasonable opportunity to prepare to meet the new aspect of the case. Such postponement would be rare, and, being dilatory and burdensome, should be granted only upon condition that the party to blame, if the blame can be located, pay all added costs.

6. It is next insisted that a perusal of the pleadings will aid the jury. That seems to me so highly improbable that it needs little, if any, reply. Notice pleadings would give the jury a general notion of the claims of each party. Formal pleadings do not materially clarify such notions. The opening statement of counsel

and, finally, the instructions of the court must be relied on to state the issues to the jury.

7. Does the allegation of the essential facts actually assist the judge (1) in eliminating irrelevant evidence? (2) in formulating his instructions? With regard to the elimination of irrelevant evidence, may I again refer to the Pleadings Act which I drafted.[12] In section 16 of that proposed act it is provided that the judge may in any case order pleadings filed which shall be sufficient to inform *the court* of the "general nature of the cause of action or defense relied upon." In other words, if a party should file a pleading, insufficient to indicate *to the court* the claim of the party, the court could require him to substitute a pleading adequate for that purpose. This the court may compel even when the opponent-party is sufficiently informed to satisfy himself, and accordingly makes no objection to the pleading. No doubt, generally, the pleadings would be sufficient to inform the court, and so this power would seldom be exercised. But it is there to meet any emergency. Now, if the court knows the nature of the cause of action, for example, that it is a claim on a promissory note for five hundred dollars and three years' interest, would it be so ignorant of what facts are essential to prove such a cause of action, as to be materially aided by the ordinary complaint on a note? I think it must be admitted that in simple cases the aid of essential-fact pleadings is not required for this purpose. In unusual, complex cases, the court might be helped by thoroughly good pleadings. The difficulty is that in such cases the assistance is seldom forthcoming. The bungling character of many complaints under the codes must often add to their work rather than enlighten them. The point is not well taken. And by way of an affirmative answer to it, I wish to urge that the present system occasionally requires the judge to permit a verdict for a party who has not proved the facts essential to his cause of action or defense. This occurs when the party's pleading is defective in omitting one or more essential allegations, and yet his opponent has not objected to it in the proper manner, or has objected in vain. Under such circumstances, proof of the facts actually alleged is sufficient to warrant a verdict.[13] Indeed if those facts are overwhelmingly established a verdict would have to

[12] See page 21, note 10.

[13] For an illustration of this, see Adams *v.* Way, 32 Conn. 160 (1864).

be ordered. This is a farcical proceeding which could not occur under notice pleading without error on the part of the trial court: Of course the senseless verdict may be set aside on a suitable motion, but the court should never have allowed such a verdict to be rendered. Essential-fact pleading thus may either mislead the judge or, more likely, compel him to act contrary to his own judicial knowledge of what are the essential facts.

Concerning the help that the pleadings may render the court in drafting instructions, I may only repeat that the court will know the essential facts without their aid. This will be especially true at the end of the trial, after the discussion and consideration naturally arising during its progress. Furthermore, counsel will be astute to present instructions covering every phase of the case. The present pleadings cannot be of great assistance. Indeed, several excellent trial judges have told me that sometimes they forget to look at the pleadings when preparing instructions.

8. The next objection to notice pleading is, that the presence of essential-fact pleadings in the record is valuable in view of the subsequent use of the case as *res judicata*. As every lawyer knows, evidence extrinsic to the record is admissible to determine what was actually *res judicata* in the case.[14] When we consider how loosely modern pleadings are constructed, and the occasional instances where new issues are made at the trial without amendment of the pleadings,[15] it is obvious that extrinsic evidence must be admitted, for the record would be a very unsatisfactory test. Probably notice pleadings would be about as useful as our present pleadings for the purpose in hand. But a much more useful expedient, and one accompanied by no such collateral ill effects as essential-fact pleadings, may be suggested. It would consist in having the court at the end of the trial make a statement on the record of the issues actually passed upon. It would be somewhat similar to the findings of the court in cases tried without a jury, though of course much simpler. This statement might be made after each counsel had presented a list of the facts he considered settled. A motion to amend it, addressed to the lower court, would be proper. I would not make the statement conclusive but merely *prima facie* evidence

[14] 24 AM. & ENG. ENCYC. OF LAW, 195, gathers many cases.

[15] See illustrations in Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234 (1893), and Blum *v.* Whitworth, 66 Tex. 350 (1886).

on the question. Being inconclusive it would not be necessary to allow an appeal from the trial court's decision. This statement, made at the end of the trial, could and would define the actual issues much more accurately than any pleadings, loosely drawn, before the trial had developed the case clearly, could hope to do. It would be simple in operation and, so far as I can see, would lead to no collateral inconveniences or delays.

9. The last argument is that untechnical pleading would cause a certain carelessness or looseness of analysis of the case on the part of both counsel and court, and thus lead to inaccurate substantive law. In the first place, a little reflection will convince one that the present pleadings, whether common-law or code, do not, in the vast majority of cases, cause any subtle analysis of the litigation in hand. They are likely to be either a rather slavish copying of forms or an ill-organized mixture of evidence, facts, and allegations of law. Often they are drawn on the theory that the more one includes in the pleading, the more likely it is to contain the essentials. Probably substantive law is but very slightly assisted by any analysis compelled by the pleadings. Secondly, all would probably agree that the really intricate questions of substantive law that arise in litigation are not often developed by the pleadings. They arise at the trial, possibly on a motion for a nonsuit or verdict and, of course, when instructions to the jury are under consideration. That such questions do not arise on the pleadings is perhaps but a corollary of the fact that the pleadings are usually not very accurately worked out. The limitation of the pleadings to complaint and answer, or other similar restriction, naturally leads to the same result. Finally, to this argument of potentially bad substantive law, one may reply with the question: Has there been any serious complaint of the deterioration of substantive law where the pleadings have been minimized in importance? True, notice pleading has not had much time to prove itself clear of this charge; but no serious complaints have arisen. The same may be said of the situation in England where a longer period has elapsed since simplified pleading went into use. In the absence of any growing criticism of decisions we must assume that the old standards are at least maintained.

VI

There is one further matter that should be mentioned. It has been urged that, assuming the adoption of a system of pleading based on notice, the test of adequate notice should be, what would sufficiently inform an opponent totally ignorant of all the circumstances of the case. In other words, it is said that you should not consider the knowledge of the opponent, in determining whether the pleading sufficiently informs him of the pleader's position. To put this contention still another way, the opponent should be notified of facts already perfectly within his knowledge. That seems rather useless. If the opponent by affidavit or *viva voce* testimony convinces the judge that the pleader's statement of his case, read in the light of all knowledge he (the opponent) has, leaves him in doubt as to what he is called upon to answer, then he is entitled to further particulars.[16] But if the pleader's statement, coupled with the opponent's knowledge, gives to the latter all the light he needs, why waste time in increasing the illumination. It is just a practical question. I fear that the suggestion of "objective notice," if that term may be employed, is made with a possibly unconscious hope that thereby we shall still have pleadings containing pretty full statements of fact. It must be admitted that occasionally the trial judge may have doubts concerning just how much information the opponent really needs. Such doubts he will rightly resolve in favor of requiring further particulars. An opponent would seldom have the temerity, we may hope, to attempt the deception of the trial judge. A street-car company, for example, that had reports from its conductors of every accident or near-accident on its lines, with the names of all bystanders and passengers, would hardly be in a position to deceive the court into granting unnecessary particulars. In this connection it should be recalled that the court may, in its discretion, compel pleadings which will adequately notify it of the causes of action or defenses. With that safeguard it seems quite unnecessary to permit the opponent to insist on being notified of things he already knows.

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[16] The obtaining of such particulars is provided for in section 9 of the draft act already referred to. See note 10, *supra*.

The law's delays! Alas! they are many, and concerning them there is much complaint. Is n't this an opportunity to eradicate one fruitful source of them?

Clarke B. Whittier.

LELAND STANFORD JUNIOR UNIVERSITY
LAW SCHOOL.